Supreme Court, U.S.
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Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Respondent Goldbelt, Inc. ("Goldbelt") supports and incorporates the questions presented in the briefs on the merits filed by Coeur Alaska, Inc. ("Coeur") and the State of Alaska.

2. If this Court reverses the decision of the Ninth Circuit Court of Appeals vacating Coeur's 404 permit for tailings disposal in Lower Slate Lake, should it also reverse that Court's decision to vacate Goldbelt's 404 permit based solely on the erroneous assumption that the Cascade Point marine terminal is contingent upon Coeur's 404 permit and proposed method of tailings disposal?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondent Goldbelt, Inc. adopts the statement of the parties to the proceedings in the petitions filed by Coeur Alaska, Inc. and the State of Alaska.

The corporate disclosure statement included in Goldbelt's brief in support of petitioners remains accurate.

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BRIEF IN SUPPORT OF GOLDBELT'S REQUEST FOR AFFIRMATIVE RELIEF

Respondent Goldbelt, Inc. respectfully submits this brief in support of its request for affirmative relief in the event the Court reverses the judgment of the United States Court of Appeals for the Ninth Circuit as to petitioners Coeur Alaska, Inc. ("Coeur"), and the State of Alaska.[1] Goldbelt adopts the briefs on the merits filed by Coeur and the State of Alaska, as supplemented by the following matters specific to the relief requested by Goldbelt.

Goldbelt is the permittee under United States Army Corps of Engineers Permit POA-1997-245-N, issued pursuant to Section 404 of the CLEAN WATER ACT, 33 U.S.C. § 1344, to construct a marine terminal at Cascade Point, north of Juneau, Alaska, for the single purpose of providing mine worker shuttle services to Coeur's Kensington Gold Mine. Respondents the Sierra Club, Southeast Alaska Conservation Council ("SEACC"), and Lynn Canal Conservation challenged Goldbelt's permit in the same proceeding that is the subject of the Petitions filed by Coeur and the State of Alaska. The Ninth Circuit Court of Appeals vacated Goldbelt's permit for the sole reason that the permit's stated purpose supposedly failed as a result of the Court's ruling vacating Coeur's Section 404 permit for disposal of tailings from the Kensington Gold Mine into Lower Slate Lake. J.A. 519a n.2 & 549a–50a.

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[1] Goldbelt files this brief and request for affirmative relief pursuant to Supreme Court Rule 12(6).

Accordingly, if this Court grants the relief requested by either Coeur or the State of Alaska on the merits, it should also reverse the Ninth Circuit's decision vacating Goldbelt's Section 404 permit and supporting Record of Decision.

STATEMENT OF THE CASE

Goldbelt incorporates the Statements of the Case in the briefs filed by Coeur and the State of Alaska, and in addition represents the following:

1. Goldbelt is an Alaska Native urban corporation created pursuant to Section 14(h)(8) of the ALASKA NATIVE CLAIMS SETTLEMENT ACT ("ANCSA"), 43 U.S.C. § 1613(h)(8), to receive and administer lands and benefits from the United States in return for extinguishment of the aboriginal title of the Tlingit Indians residing in the vicinity of Juneau, Alaska. Goldbelt is wholly owned by Tlingit Indians, who are the current owners and descendants of the aboriginal occupants of the land on which the proposed and partially constructed Cascade Point marine terminal is located.

2. The Tlingit have lived in southeast Alaska from time immemorial. Berners Bay, where both the Kensington Gold Mine and Cascade Point are located, lies in the heart of Auke Tlingit aboriginal territory. J.A. 332a. *See also* 7 HANDBOOK OF NORTH AMERICAN INDIANS, NORTHWEST COAST, at 204 (Smithsonian Inst. 1990).

3. When Congress enacted the landmark ANCSA in 1971, it granted Goldbelt, on behalf of its more than 3,000 Tlingit Indian shareholders, the right to select 23,040 acres of land as partial compensation for the lands illegally taken by non-Native interlop-

ers and the United States Government in flagrant disregard of the Tlingit's aboriginal rights. J.A. 333a–34a.

4. When the Secretary of the Interior withdrew lands on Admiralty Island for Native selections pursuant to ANCSA, the Sierra Club and others sued to block Goldbelt's selections there.[2] Unlike several other Native Corporations that successfully maintained their right to develop their Admiralty Island lands, Goldbelt attempted to accommodate the environmental community by agreeing in 1979 to exchange its Admiralty Island selection rights for other lands thought to be less environmentally sensitive.[3] These lands included Cascade Point on the southern shore of Berners Bay. The exchange was ratified in Section 506(b) of the ALASKA NATIONAL INTEREST

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[2] Admiralty Island was originally designated it as a national monument in 1978 by President Jimmy Carter, in part to protect the archeological evidence of more than 10,000 years of continuous Tlingit occupancy. PRESIDENTIAL PROCLAMATION 4611 (December 1, 1978). Congress confirmed the creation of the monument in Section 503(b) of the ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT ("ANILCA"), Pub.L. 96-487, 94 Stat. 2399 (December 2, 1980).

[3] *See* 44 Fed. Reg. 48379 (August 12, 1979) (purpose of exchange to avoid continued litigation and further delays in land conveyances.) The exchange was intended to, and did, result in mooting the Sierra Club's challenge to Goldbelt's Admiralty Island selections. Although the Sierra Club was not a party to the exchange agreement, it was a direct and intended beneficiary. No objection by the Sierra Club, or anyone else, to substituting Cascade Point for Admiralty Island, appears in the Congressional record relating to the exchange.

LANDS CONSERVATION ACT ("ANILCA"), Pub. L. 96-487, 94 Stat. 2371, 2409 (December 2, 1980).

5. Cascade Point is on the Juneau road system and potentially very valuable. J.A. 334a. The City and Borough of Juneau has designated the lands around Cascade Point as a "new growth area." Goldbelt has expended a great deal of time and effort in responsible land use planning for the area. *Id.* Every single attempt by Goldbelt to put these lands to productive use, however, has been challenged and frustrated by the very same environmental organizations that sued to force Goldbelt off Admiralty Island. *Id.* 335a. Among other actions, the environmental organizations who appear as respondents in this proceeding (1) successfully opposed Goldbelt's efforts to permit a general purpose dock at Cascade Point in 1998, (2) opposed and appealed (unsuccessfully) Goldbelt's right to obtain surface access to its lands in 1999, and (3) successfully lobbied local, state and federal agencies to limit Goldbelt's use of a dock at Cascade Point to mine shuttle operations only. *Id.* As a result of the inequitable actions of the Sierra Club, SEACC and Lynn Canal Conservation, the intent of Congress has been frustrated, and Goldbelt's lands on Berners Bay have lain unproductive for the past quarter century.

6. When Coeur announced its intent to reopen the historic Kensington Gold Mine on the north shore of Berners Bay – which is accessible only by air or water – Goldbelt saw a perfect opportunity to develop its lands at Cascade Point on the south shore of the Bay as a marine terminal to provide mine worker shuttle services to the Mine.

7. Goldbelt's proposal was treated as a component of the overall Kensington Plan of Operations, and was subjected to years of exhaustive environmental studies by federal, state and local agencies. These studies included (1) an Environmental Impact Statement prepared pursuant to the NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, by the United States Forest Service, United States Army Corps of Engineers ("the Corps"), United States Environmental Protection Agency, and the State of Alaska, (2) a Biological Opinion prepared by the National Marine Fisheries Service pursuant to the ENDANGERED SPECIES ACT, 16 U.S.C. §§ 1531, et seq., (3) an Essential Fisheries Habitat study pursuant to the MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT, 16 U.S.C. §§ 1801, *et seq.*, (4) environmental and public interest reviews by the Corps pursuant to Section 404(b)(1) of the CLEAN WATER ACT, 33 U.S.C. § 1344(b)(1), and (5) Coastal Zone Consistency review by the State of Alaska pursuant to the COASTAL ZONE MANAGEMENT ACT, 16 U.S.C. §§ 1451 *et seq.* In each instance, Goldbelt's marine terminal proposal was found to satisfy all regulatory requirements for permit issuance. Not one of the favorable environmental findings reached in these numerous studies and reports has been challenged by the Sierra Club, SEACC, or Lynn Canal Conservation.

8. The Corps specifically concluded that Goldbelt's marine terminal proposal was the least environmentally damaging, practicable alternative for transporting workers to the Kensington Gold Mine site. J.A. 356a. When the Corps issued its Section 404 permit for a marine terminal limited to mine

shuttle operations, however, the Sierra Club, SEACC and Lynn Canal Conservation filed suit alleging that Goldbelt's permit was inextricably linked by purpose to Coeur's Section 404 permit for tailings disposal in Lower Slate Lake, and therefore could not survive a successful companion challenge to Coeur's permit.

SUMMARY OF ARGUMENT

1. The challenge to Goldbelt's permit, and the only reason given by the Ninth Circuit Court of Appeals for vacating that permit and its supporting Record of Decision, is the unsupported and arbitrary and capricious assumption that the Cascade Point marine terminal cannot fulfill its intended purpose of transporting workers to the Kensington Gold Mine site if Coeur is denied the right to dispose of mine tailings in Lower Slate Lake. If this Court reverses – as it should – the Ninth Circuit's decision vacating Coeur's permit for the tailings disposal, no basis for vacating Goldbelt's permit remains and the decision vacating Goldbelt's permit must be reversed as well.

2. Important considerations of public policy and justice also support granting relief to Goldbelt. Bullied out of their original land selections on Admiralty Island by the Sierra Club, all the Tlingit Indians have to show for a quarter century of expensive planning efforts and attempts to accommodate environmental objections is a partially completed, expensive and unusable breakwater. Granting the relief requested by Goldbelt will at long last enable the Tlingit Indians to realize the benefits Congress intended when it conveyed the Cascade Point lands to Goldbelt in lieu of its Admiralty Island selection rights.

ARGUMENT

I. IF THE COURT GRANTS THE RELIEF REQUESTED WITH RESPECT TO COEUR'S 404 PERMIT, SIMILAR RELIEF MUST BE GRANTED TO GOLDBELT WITH RESPECT TO ITS CASCADE POINT PERMIT

The Ninth Circuit's decision vacating Goldbelt's 404 permit and the agency's supporting Record of Decision ("ROD") is based on nothing more than its unsupported assumption that the purpose of providing shuttle service to the Kensington Gold Mine site cannot be accomplished if the Coeur 404 permit for tailings disposal in Lower Slate Lake is vacated. Thus, if this Court reverses the Ninth Circuit decision and restores Coeur's 404 permit and related authorizations for tailings disposal, no basis remains under the Ninth Circuit decision to vacate Goldbelt's permit, and as a matter of law the Ninth Circuit ruling regarding Goldbelt's permit must also be reversed. ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The Ninth Circuit decision vacating the Goldbelt 404 permit and supporting ROD is arbitrary and capricious: it presumes without foundation that the mine shuttle service purpose of the Goldbelt permit depends entirely on the Cocur 404 permit and cannot be accomplished if Coeur is required to modify its method of tailings disposal. *See* J.A. 519a n.2 & 549a–50a. This assumption is demonstrably incorrect. Goldbelt's permit is not tied to any particular method of tailings disposal. *See* C.A. E.R. 550-54 & 573. The Ninth Circuit had no basis in the record

before it to conclude that the Kensington Gold Mine, in which Coeur has invested hundreds of millions of dollars over the past decades, and which is poised to begin production pending only completion of a tailings disposal facility, would be abandoned if Coeur were required to find an alternative means of tailings disposal.[4] Any delay caused by the Ninth Circuit's decision with respect to the Lower Slate Lake method of tailings disposal might affect the timing of operations from Cascade Point, but did not provide a rationale for vacating the permit – let alone the ROD that took years of conscientious effort and expense to compile.[5]

The Corps of Engineers' action in granting a permit to Goldbelt for construction of a dock at Cas-

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[4] The Ninth Circuit's apparent assumption that its decision would result in abandonment of the Kensington Gold Mine and obviate the need for a marine terminal to transport mine workers is nonsensical. Although Coeur, the State of Alaska and the Corps agree that placement in Lower Slate Lake is the least environmentally harmful, practicable alternative for disposing of mine tailings, Coeur has been forced by the Ninth Circuit's erroneous ruling to file a contingent application for a permit employing a more expensive, less environmentally-friendly dry stack "paste" (surface) method of tailings disposal. That application was filed without prejudice to this appeal.

[5] The Ninth Circuit acknowledged that the "normal remedy" for unlawful agency action is to vacate the action and remand to the agency to act in compliance with its statutory obligations. J.A. 550. *Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Instead, the Ninth Circuit vacated not only Goldbelt's permit, but the ROD on which it was based – a ROD that the appellants had not challenged and the Court apparently did not even consider – thus sending Goldbelt back to square one.

cade Point cannot be vacated unless, after a "searching and careful" review of the ROD, the reviewing Court is left with the conclusion that there is no rational basis for issuance of the permit. *Citizens to Preserve Overton Park, Inc. v. Volpe*, supra, 401 U.S. at 416.

Here, the Sierra Club, SEACC, and Lynn Canal Conservation did not challenge the adequacy or the findings supporting any of the documents that examined exhaustively the environmental impacts of constructing and operating the Cascade Point marine terminal – the Environmental Impact Statement prepared pursuant to NEPA, the Essential Fish Habitat report prepared pursuant to the MAGNUSON-STEVENS ACT, the Biological Opinion prepared pursuant to the ENDANGERED SPECIES ACT, the State of Alaska's Certification pursuant to the CLEAN WATER ACT and its Consistency Determination pursuant to the COASTAL ZONE MANAGEMENT ACT, and the Corps of Engineers' Section 404(b)(1) Evaluation and Public Interest Review pursuant to the CLEAN WATER ACT. Nor does it appear that the Ninth Circuit even considered, let alone searchingly and carefully reviewed, this extensive record in reaching its decision with respect to Goldbelt.

II. IMPORTANT CONSIDERATIONS OF PUBLIC POLICY AND JUSTICE ALSO SUPPORT GRANTING RELIEF TO GOLDBELT

In addition to the reasons given by Coeur and the State of Alaska, this Court should reverse the decision of the Ninth Circuit Court of Appeals regarding Goldbelt's 404 permit because the decision deprives

Goldbelt and its Tlingit Indian shareholders of the economic benefits intended by Congress when it enacted ANCSA and conveyed the Cascade Point lands to Goldbelt. That decision has dealt a devastating blow to economically disadvantaged Tlingit Indians throughout northern southeast Alaska.

Congress intended that Goldbelt would be able to use Cascade Point for economic development and betterment of Goldbelt's shareholders.[6] *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996–97 (9th Cir. 1984) (Congress expected and intended that Alaska Native Corporations would select their Settlement Act lands for economic development purposes); *City of Angoon v. Marsh*, 749 F.2d 1413, 1488 (9th Cir. 1984) (permitting Native Corporation to log ANCSA lands within Admiralty Island National Monument) ("it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by forbidding the only real economic use of the lands conveyed").

Congress emphasized its intent to facilitate Goldbelt's acquisition and use of its Berners Bay lands by exempting the off-Admiralty exchange from review under NEPA. ANILCA Section 506(b), 94 Stat. 2409. Yet, more than a quarter century later, the never-ending administrative and court challenges filed by the Sierra Club, SEACC and the Lynn Canal Conservation Society have deprived Goldbelt

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[6] Congress was well aware that Goldbelt was willing to exchange its selections on Admiralty Island only if its economic interests would be furthered. H.Rep. No. 95-1045, Part I (April 7, 1978).

of virtually any productive use of its lands at Cascade Point.

It would be difficult to overstate the importance of the Kensington Gold Mine and Cascade Point marine terminal to the Tlingit Indians of the Juneau area – Goldbelt's shareholders. The Ninth Circuit's decision to vacate the Coeur and Goldbelt permits has done far more than unfairly dash Goldbelt's most recent attempt to use its Settlement lands. It has struck a crippling blow to the economic aspirations of a generation of Tlingit Indians living in northern southeast Alaska.

Southeast Alaska has been hard hit by the decline of the timber and fishing industries. J.A. 505a. In the Juneau area, the economic downturn has been compounded by a contraction of employment opportunities in the public sector. *See* C.A. Br. of the City and Borough of Juneau, as *Amicus Curiae* in Support of Defendants-Appellees 12. Economists estimate that the lack of decent paying jobs is resulting in a net out-migration of as much as 4500 persons a year from Southeast Alaska, especially in the 25- to 35-year-old range. *See* C.A. *Amicus Curiae* Br. of Southeast Conf. in Support of Defendants-Appellees 6 (the Southeast Conference represents the interests of thirty Southeast Alaska member communities, nine Alaska Native corporations, and numerous other private and public entities in the region).

The economic hard times have crippled the rural, largely Native, areas of Southeast Alaska where employment opportunities are virtually non-existent. *See* C.A. Br. of *Amicus Curiae* Berners Bay Consortium in Support of Appellees 4 (the Consortium is a

coalition of Native Corporations and Coeur Alaska, Inc.). Although many of Goldbelt's shareholders reside in the Juneau area, their unemployment rates are two to three times higher than the rates for non-Natives. Much of the employment that is available to them is seasonal, low paying and without benefits. J.A. 506a.

From the outset, Coeur has recognized that the Kensington Gold Mine lies at the heart of Tlingit traditional territory and has taken truly extraordinary measures to insure that Native Alaskans are included in the prosperity that the mine promises. These efforts not only have been exemplary, they are unprecedented. As one Tlingit leader put it:

> No other company . . . has ever worked so conscientiously as Coeur to involve the Natives of Northern Southeast Alaska in the planning of its activities, or been so diligent in its efforts to ensure that Alaska Natives are included in the economic benefits to be derived from its operations.

J.A. 505a.

Before the Ninth Circuit effectively shut down the Kensington Gold Mine, Coeur had been training Alaska Natives for high-paying, full-time jobs in the mining industry. Roughly 25 percent of the construction workforce at the Kensington Gold Mine was Alaska Native. Coeur had promised partnerships with Native Corporations, including Goldbelt, to provide goods and services – such as the mine shuttle service Goldbelt plans to operate from its Cascade Point terminal. J.A. 503a–05a.

The optimism generated by Coeur's Native-friendly operations has been dashed by the Ninth Circuit's rulings. This Court should reverse – not only to correct an erroneous reading of the Clean Water Act – but to fulfill the quarter-century-old promise of Congress that the lands it intended for the economic benefit of the Tlingit Indians not be locked up in perpetuity by endless, inequitable litigation by the Sierra Club, SEACC and Lynn Canal Conservation aimed at relegating those lands to de facto wilderness status.

CONCLUSION

For these reasons, and for the reasons set out in the briefs on the merits of Coeur and the State of Alaska, the decision of the Ninth Circuit Court of Appeals should be reversed as to the federal defendants, Coeur and also Goldbelt.

Respectfully submitted.

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